FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit

November 28, 2011

Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE ARTHUR JAMES REEVES, member Art Reeves, member Art Reeves Builders LLC, member Mountain View Design & Build LLC, Debtor.	BAP No. CO-11-035
LAWRENCE RAYNER and SALLY RAYNER, Plaintiffs – Appellees, v. ARTHUR JAMES REEVES, Defendant – Appellant.	Bankr. No. 09-23389 Adv. No. 09-01611 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before MICHAEL, NUGENT, and RASURE, Bankruptcy Judges.[1]

MICHAEL, Bankruptcy Judge.

Judging is a hard business. Trial judges make difficult calls on an almost daily basis. As a matter of law, many fall within the range of a judge's discretion. In those cases, it is not the province of a reviewing court to ask,

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* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

[1] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

"what would I have done in that position?" Instead, the inquiry is whether the decision made by the trial judge falls outside the range of permissible choice. Such is the case here, where the trial court denied a motion for extension of time to file a notice of appeal. Having reviewed the record and applicable law, we conclude the trial court did not abuse its discretion in denying the extension, and affirm.

I. BACKGROUND FACTS

On appeal before this Court is the bankruptcy court's order denying the motion of debtor Arthur James Reeves ("Reeves") for an extension of time to file a notice of appeal. The underlying order Reeves seeks to appeal is a summary judgment in favor of creditors Lawrence and Sally Rayner (the "Rayners") determining their claim, based on a state court judgment in the amount of $100,000, to be nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).[2] The following describes the circumstances giving rise to the Rayners' claim,[3] and the history of the adversary proceeding before the bankruptcy court.

A. The Rayners' Claim Against Reeves

The Rayners contracted with Reeves Custom Builders, Inc. ("RCB") to remodel their house located in Lake Geneva, Wisconsin. RCB was 100% owned by Reeves and his wife. The Rayners paid RCB for construction work that was never performed. In 2001, the Rayners sued RCB and Reeves in Wisconsin state

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[2] *Judgment*, *in* Appellant's App. at 106. Unless otherwise indicated, all future statutory references in text are to the Bankruptcy Code, Title 11 of the United States Code. We assume that Reeves intends to appeal the decision if the decision of the bankruptcy court is reversed. If not, our work is nothing more than an academic exercise.

[3] The facts are taken primarily from the bankruptcy court's *Memorandum Opinion and Order (1) Granting Plaintiffs' Motion for Summary Judgment Filed on December 27, 2010; (2) Denying Defendant's Cross-Motion for Summary Judgment (Docket #32) ("Memorandum Opinion")*, *in* Appellant's App. at 94. The bankruptcy court found these facts to be not genuinely disputed. *See Memorandum Opinion* at 4, n.14, *in* Appellant's App. at 97.

court, alleging breach of contract and fraudulent conduct. After more than four years of litigation, Reeves convinced the Rayners and the Wisconsin state court that he had no money or property from which a judgment could be satisfied. The parties entered into a stipulation dismissing the state court action dependent upon the truthfulness of these representations made by Reeves: 1) Reeves and his wife did not have assets exceeding the $25,000 bankruptcy exemption limit; 2) Reeves had not transferred any assets except in the ordinary course of business, or except for fair consideration; and 3) Reeves' testimony before the Wisconsin state court was truthful.[4] The stipulation provided that if any of Reeves' representations were false, the Rayners would be entitled to a judgment against Reeves in the amount of $100,000.[5]

The Rayners subsequently discovered that Reeves' representations were false. Based on the stipulation, the Rayners filed a motion for judgment with the Wisconsin state court. After extensive testimony by and cross examination of Reeves, the state court found that: 1) Reeves and his wife had assets in excess of $25,000 at the time of his previous testimony; 2) Reeves' previous testimony was not truthful because he failed to disclose that his brother was involved in a real estate transaction in which the Reeves transferred their principal asset, a home and five acres of land; and 3) Reeves and his wife transferred property with a fair market value of $52,000 to his parents' revocable trust for the recorded price of $10,000.[6] As a result, the Wisconsin state court entered judgment in favor of the

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[4] *Order for Judgment* at 2, *in* Appellant's App. at 21, attached as *Exhibit C to Complaint to Determine Dischargeability of Indebtedness 11 U.S.C. 523 ("Complaint")*.

[5] *Memorandum Opinion* at 2, *in* Appellant's App. at 95.

[6] *Order for Judgment* at 2-3, *in* Appellant's App. at 20-21.

Rayners in the amount of $100,000 on June 8, 2007 (the "Wisconsin Judgment").[7] Reeves appealed the decision to the Wisconsin Court of Appeals.[8]

In 2005, Reeves was charged with three counts of felony theft by contractor in a Wisconsin criminal proceeding.[9] Reeves pled guilty to those charges in January of 2008. As part of his sentencing, Reeves was ordered to pay criminal restitution to several victims, including $78,692 to the Rayners (the "Criminal Restitution").[10]

B. Bankruptcy Court Proceedings

Reeves filed his petition for Chapter 7 relief on July 7, 2009. Reeves' appeal of the Wisconsin Judgment was pending before the Wisconsin Court of Appeals when he filed bankruptcy. Anticipating the Rayners' nondischargeability suit, Reeves filed a motion for relief from automatic stay on October 8, 2009, informing the bankruptcy court that the briefing schedule in the appeal was complete except for a response brief due from the Rayners, and asking that the appeal be allowed to proceed.[11] Reeves argued for stay relief on the basis that: 1) "[t]he State Court action will result in a resolution of the civil claim between [Reeves] and the [Rayners], will be determinative of whether or not the [Rayners] have a claim, the nature of the claim, if any, that the [Rayners] might have against [Reeves], and the amount of the claim, if any;" 2) "[t]he State Court determination will significantly reduce the complexity of dischargeability issues in this case;" and 3) "[i]t would be prejudicial to both parties to have to relitigate

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7 *Id.* at 3, *in* Appellant's App. at 21.

8 *See Memorandum Opinion* at 2, *in* Appellant's App. at 95.

9 Appellees' Brief at 6. *See also Exhibits A and B to Complaint*, *in* Appellant's App. at 13-19.

10 *Complaint* at 4, *in* Appellant's App. at 12.

11 *Motion for Relief from Automatic Stay Pursuant to 11 U.S.C. 362(a)* at 1-2, *in* Appellees' App. at 14-15.

the claims in the Bankruptcy Court in light of the fact that the issues are ripe for determination in the State Court upon the submission of the final brief."[12] The Rayners objected to the motion for relief.[13] The bankruptcy court held a hearing on the matter on November 10, 2009. The bankruptcy court denied the Rayners' objection, and directed Reeves' counsel to prepare an order lifting the stay.[14] An acceptable proposed order submitted by the Rayners' counsel, not Reeves' counsel, was entered by the bankruptcy court on January 19, 2010.[15]

The Rayners filed their complaint initiating this adversary proceeding on October 9, 2009, seeking to except from discharge the Criminal Restitution pursuant to § 523(a)(7), and the Wisconsin Judgment pursuant to § 523(a)(2)(A), (a)(4), and (a)(6). Reeves filed an answer to the Rayners' adversary complaint on November 9, 2009, denying that the Criminal Restitution and the Wisconsin Judgment were excepted from discharge. Additionally, Reeves asserted as an affirmative defense that both the criminal and civil matters were on appeal before Wisconsin state courts.[16] Reeves' representation that the criminal matter had been appealed was false. On December 18, 2009, the Rayners filed a motion for summary judgment with respect to nondischargeability of the Criminal

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[12] *Id.* at 1-2, *in* Appellees' App. at 14-15.

[13] *Objection to Motion for Relief from Automatic Stay*, *in* Appellees' App. at 22.

[14] *Minutes of Electronically Recorded Proceeding, Held November 10, 2009*, *in* Appellees' App. at 49-50.

[15] *Order Granting Relief from Stay, in* Appellees' App. at 59.

[16] *Answer to Complaint to Determine Dischargeability of Indebtedness* at 1-2, *in* Appellant's App. at 37-38.

Restitution.[17] Reeves filed a motion for extension of time to respond,[18] which the bankruptcy court granted.[19] When Reeves responded on January 25, 2010, he confessed that the Criminal Restitution was nondischargeable.[20] As a result, the bankruptcy court granted the Rayners' motion for summary judgment on February 16, 2010, determining the Criminal Restitution payable to the Rayners in the amount of $78,692 nondischargeable pursuant to § 523(a)(7).[21]

On October 13, 2010, the Wisconsin Court of Appeals affirmed the Wisconsin Judgment.[22] On December 27, 2010, the Rayners filed a motion for summary judgment in bankruptcy court with respect to nondischargeability of the Wisconsin Judgment.[23] Reeves again filed a motion for extension of time to respond to the motion for summary judgment.[24] The bankruptcy court granted Reeves an extension until January 31, 2011.[25] When Reeves responded, he not

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[17] *Motion for Summary Judgment on Plaintiffs' First Claim for Relief* at 1-2, *in* Appellant's App. at 39-40.

[18] *Motion for Extension of Time in Which to Respond to Plaintiffs' Motion for Summary Judgment*, *in* Appellees' App. at 4. Reeves actually filed two motions for extension on the same day. According to the Rayners, the second motion was necessary because in his first motion Reeves misrepresented to the bankruptcy court that they consented to the extension of time. *See* Appellees' Brief at 14 and *Motion for Extension of Time in Which to Respond to Plaintiffs' Motion for Summary Judgment, in* Appellees' App. at 1.

[19] *Order Re: Motion for Extension of Time in Which to Respond to Plaintiffs' Motion for Summary Judgment*, *in* Appellee's App. at 7.

[20] *Response*, *in* Appellant's App. at 55.

[21] *Order on Motion for Summary Judgment on Plaintiffs' First Claim for Relief* at 1-2, *in* Appellant's App. at 57-58.

[22] *Memorandum Opinion* at 3-4, *in* Appellant's App. at 96-97.

[23] *Motion for Summary Judgment on Plaintiffs' Third Claim for Relief*, *in* Appellant's App. at 61.

[24] *Motion for Extension of Time to File Response to Motion for Summary Judgment on Plaintiffs' Third Claim for Relief*, *in* Appellees' App. at 11.

[25] *Order Re: Motion for Extension of Time to File Response to Motion for*

(continued...)

only denied that the Rayners were entitled to summary judgment, but sought summary judgment in his favor, claiming the Wisconsin Judgment was dischargeable because it represented compensatory damages arising out of a contract dispute.[26] The Rayners responded on February 15, 2011.[27] On June 3, 2011, the bankruptcy court entered its memorandum opinion and judgment granting the Rayners' motion for summary judgment, declaring the Wisconsin Judgment to be nondischargeable pursuant to § 523(a)(2)(A).[28]

Reeves filed his motion for extension of time to appeal the nondischargeability judgment on June 16, 2011, one day before the deadline for filing the notice of appeal, asking the bankruptcy court to extend the deadline to July 8, 2011, a period of 21 days.[29] The motion, filed by Reeves' trial counsel, stated that Reeves "is consulting with an attorney who handles bankruptcy appeals before filing a notice of appeal in this Court. [Reeves] resides in Crested Butte, CO, and has been referred to counsel in Grand Junction, CO, who is currently reviewing the file to advise [Reeves] as to the appeal."[30] On June 21, 2011, the bankruptcy court entered its order and judgment denying Reeves'

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[25] (...continued)
Summary Judgment on Plaintiffs' Third Claim for Relief, *in* Appellees' App. at 13.

[26] *Response to Motion for Summary Judgment on Plaintiffs' Third Claim for Relief and Reeves' Cross-Motion for Summary Judgment* at 6, *in* Appellant's App. at 82.

[27] *Plaintiffs' Response to Cross-Motion for Summary Judgment on Plaintiffs' Third and Fourth Claims for Relief*, *in* Appellant's App. at 84.

[28] *Memorandum Opinion* at 1-2, *in* Appellant's App. at 94-95; *Judgment*, *in* Appellant's App. at 106.

[29] *Motion for Extension of Time to File Appeal Pursuant to FRBP 8002(c) ("Motion for Extension of Time")*, *in* Appellant's App. at 119.

[30] *Motion for Extension of Time* at ¶ 2, *in* Appellant's App. at 119.

motion for extension of time to appeal.[31] In denying Reeves' motion, the bankruptcy court found that:

> 1. The litigation between the parties has lasted over 10 years. Any further delay would be an undue delay.
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> 2. The record before the Court reflects that [Reeves] is a seasoned litigator familiar with the needs and process of appeals. The litigation experience of [Reeves] largely obviates more time and delay necessary for him to make the decision to appeal this Court's Memorandum Opinion and Order.
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> 3. Because the history of this adversary proceeding and previous litigation in Wisconsin state court reflect a history of delay, [Reeves] does not set forth good cause to grant a further extension of time to file an appeal.[32]

Reeves timely appealed the bankruptcy court's denial of his motion for extension of time to this Court on July 1, 2011.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[33] Neither party elected to have this appeal heard by the United States District Court for the District of Colorado. The parties have therefore consented to appellate review by this Court.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[34] A bankruptcy court's order denying a motion for extension of time to file a notice of appeal is

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[31] *Order Denying Motion for Extension of Time to File Appeal Pursuant to Fed. R. Bankr. P. 8002(c) ("Order Denying Motion for Extension of Time")*, *in* Appellant's App. at 122; *Judgment*, *in* Appellant's App. at 123.

[32] *Order Denying Motion for Extension of Time*, *in* Appellant's App. at 122.

[33] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[34] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

final for purposes of appellate review.[35]

III. STANDARD OF REVIEW

A bankruptcy court's denial of a motion for extension of time to file an appeal is reviewed for abuse of discretion.[36] Under the abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.[37] A trial court abuses its discretion when it makes "'an arbitrary, capricious, whimsical, or manifestly unreasonable judgement.'"[38]

IV. ANALYSIS

Federal Rule of Bankruptcy Procedure 8002, entitled Time for Filing Notice of Appeal, provides in pertinent part that the "notice of appeal shall be filed with the [bankruptcy court] clerk within 14 days of the date of the entry of the judgment, order, or decree appealed from," and further, that except with respect to certain types of orders not on appeal in this case, "[t]he bankruptcy judge ***may*** extend the time for filing the notice of appeal by any party."[39] Use of the word "may" in a statute or rule connotes that an action is permissive, rather than mandatory.[40] Thus, our task is limited to determining whether the

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[35] *In re Higgins*, 220 B.R. 1022, 1025 (10th Cir. BAP 1998) (citing *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427, 431 (8th Cir. 1990); *Belfance v. Black River Petroleum, Inc. (In re Hess)*, 209 B.R. 79 (6th Cir. BAP 1997)).

[36] *In re Higgins*, 220 B.R. at 1024 (citing *Key Bar Invs. v. Cahn (In re Cahn)*, 188 B.R. 627 (9th Cir. BAP 1995)).

[37] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994).

[38] *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (quoting *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991)).

[39] Fed. R. Bankr. P. 8002 (a)&(c) (emphasis added).

[40] *Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't*, 533 F.3d 1183, 1186 (10th Cir. 2008) (citing *United States v. Rodgers*, 461 U.S.

(continued...)

bankruptcy court abused its discretion in denying Reeves' motion for extension of time to appeal.

Reeves argues the bankruptcy court abused its discretion because an extension of time to appeal would create "no delay in the administration of this bankruptcy case, no inconvenience to the Court, no prejudice to the [Rayners]," but denial of the motion to extend time constitutes "an undue hardship to [Reeves]."[41] In reviewing the bankruptcy court's exercise of discretion, Reeves asks this Court to apply a test crafted by the Bankruptcy Appellate Panel of the Ninth Circuit, rather than a previous decision of this Court. We are not free to do so. "Our decision is dictated by the principle that we are bound by prior panel decisions. A panel cannot overrule the judgment of another panel of the court."[42]

In re Higgins

This Court dealt with the issue of whether a bankruptcy court has the discretion to deny a motion for extension of time to file a notice of appeal in *In re Higgins*.[43] In *Higgins*, the bankruptcy court, without a hearing and without setting forth specific findings in its order, denied a creditor's request to extend time to appeal its orders granting the debtor's objection to creditor's claim for attorney's fees under § 506(b) and its motion to amend judgment.[44] The creditor filed the motion for extension within the prescribed period for filing an appeal, as

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[40] (...continued)
677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion.")).

[41] Appellant's Opening Brief at 7.

[42] *In re Blagg*, 223 B.R. 795, 804 (10th Cir. BAP 1998) (citing *Starzynski v. Sequoia Forest Indus.*, 72 F.3d 816, 819 (10th Cir. 1995)). *See also In re Vaughan*, 311 B.R. 573, 585 (10th Cir. BAP 2004), *aff'd*, 241 F. App'x 478 (10th Cir. 2007).

[43] 220 B.R. 1022 (10th Cir. BAP 1998).

[44] *Id.* at 1024.

did Reeves in this case, asking for an additional 20 days on the basis that the confirmation hearing on debtor's Chapter 13 plan had yet to occur.[45] Notwithstanding the bankruptcy court's denial of the motion for extension of time, after the appeal time had run, the creditor filed a notice of appeal purporting to appeal the bankruptcy court's order granting debtor's objection and its order denying creditor's motion to amend, in addition to the order denying an extension of time to appeal.[46] In their appellate briefs, neither the creditor nor the debtor addressed the bankruptcy court's order denying extended time to appeal, and instead focused only on the merits of the appeal of the underlying orders.[47]

On appeal, this Court affirmed the bankruptcy court's denial of the motion for extension of time, and refused to address the merits of the other purportedly appealed orders, because absent a timely notice of appeal, it lacked jurisdiction to do so.[48] The panel determined that "[t]he bankruptcy court has discretion in passing on such motions to extend time and considers the motion in light of the specific circumstances of each case."[49] Further, the panel explained:

> The fact that [creditor] filed her motion for extension within the initial [fourteen]-day appeal time does not automatically mean the extension will be granted. The word "may" contained in the first sentence of Fed. R. Bankr. P. 8002(c) clearly indicates that the court has discretion in passing on such motions. If such extensions were to be automatically granted, the rule would state "shall."[50]

The panel noted that denial of motions for extension of time filed before expiration of the time period for appealing were unusual, but after reviewing the

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45 *Id.* at 1025.

46 *Id.* at 1024.

47 *Id.*

48 *Id.*

49 *Id.* at 1025.

50 *Id.*

record, concluded the bankruptcy court had not abused its discretion.

In re Betacom

The Ninth Circuit BAP dealt with this issue in *In re Betacom of Phoenix, Inc.*[51] In *Betacom*, creditors moved to extend time to appeal the bankruptcy court's order denying their motion to amend a claim of proof until after a mediation conference scheduled in the bankruptcy proceeding.[52] The bankruptcy court, citing *Higgins*, denied the creditors' motion for extension and creditors appealed to the Ninth Circuit BAP.[53] In its opinion reversing the bankruptcy court's order, the Ninth Circuit BAP stated that a "motion for an extension [of time to appeal] is essentially a motion for a continuance," and therefore, it adopted a modified version of the Ninth Circuit's standard for evaluating a motion for continuance.[54] According to the Ninth Circuit BAP,

> the factors for assessing how to exercise the court's discretion with respect to a motion for extension of time in which to file a notice of appeal are: (1) whether the appellant is seeking the extension for a proper purpose; (2) whether the need for an extension would likely be met if the motion were granted; (3) the extent to which granting the motion would inconvenience the court and the appellee or would unduly delay the administration of the bankruptcy case; and (4) the extent to which the appellant would be harmed if the motion were denied.[55]

The *Betacom* test is adapted from the criteria developed by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") to evaluate a motion for continuance in *United States v. Flynt*, an appeal of five judgments of criminal

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51 250 B.R. 376 (9th Cir. BAP 2000).

52 *Id.* at 378.

53 *Id.* at 379.

54 *Id.* at 381.

55 *Id.* (footnotes omitted).

contempt of court.[56] In *Flynt*, the Ninth Circuit concluded the district court abused its discretion when it denied the defendant's motion for continuance so he could obtain psychiatric evaluations relevant to his lack of requisite mental capacity to commit contempt, his only defense to the criminal charges.[57] A test developed under those circumstances hardly seems translatable to the bankruptcy context.

After review of both cases, even if we were not bound by the decisions of prior panels, we view the analysis and ruling of this Court in *Higgins* more compelling than that of the Ninth Circuit BAP in *Betacom*. The adapted test in *Betacom* seems tautological. Several of its elements are often true by definition. For example, an appellant who is foreclosed from appealing because he or she was denied an extension of time will always be harmed. Additionally, if an appellant would otherwise be foreclosed from appealing, granting the motion to extend time would always prejudice the appellee, assuming an appeal is ultimately filed.

Notwithstanding the wording of the test in *Betacom*, it appears that the Ninth Circuit BAP noted that there might be times when denial of a requested extension would be appropriate. The comments in footnote 5 of *Betacom* are instructive:

> It is unlikely that the basis for an extension motion that is filed within the initial [fourteen]-day appeal period will be an inability to comply with the [fourteen]-day deadline set forth in Rule 8002(a). Therefore, we believe that it is more appropriate to consider whether the appellant has a proper purpose in seeking the extension.
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> Examples of an improper purpose may include an appellant seeking an extension in a proceeding in which there has been a history of delay or abuse or an appellant who seeks the extension

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[56] 756 F.2d 1352, 1359 (9th Cir. 1985).

[57] *Id.* at 1362.

solely as a litigation tactic.[58]

In this case, the bankruptcy court specifically found a history of delay in the proceedings. Reeves does little to challenge that finding on appeal.

In his reply brief, Reeves states that with respect to nondischargeability of the Criminal Restitution, the Rayners were granted summary judgment a little over four months after filing their adversary.[59] He asserts that "any appeal does not stay [the Rayners] from seeking enforcement of their judgment, and the appeal does not affect any administration of the bankruptcy case. Consequently, there would be no undue delay that would prejudice the [Rayners] or impact the administration of this case."[60] This is not necessarily so. If Reeves is allowed to appeal, pursuant to Federal Rule of Bankruptcy Procedure 8005 he is entitled to ask the bankruptcy court for a stay of its nondischargeability judgment pending appeal, and if the bankruptcy court declines, is then permitted to request such relief from this Court.

In support of his appeal, Reeves cites *Collier on Bankruptcy*: "[t]he absence of a standard to govern the decision of the bankruptcy judge if the request for an extension of time is made prior to expiration of the periods presented in Rule 8002(a) and (b) suggest [sic] that . . . the extension should be almost automatic."[61] Unfortunately, Reeves ignores the current version of *Collier*, in which the phrase "almost automatic" has been replaced with the word "routine," and further states, "[i]t will nevertheless be the brave appellant that places all its bets on the court's granting the motion, letting the 14-day appeal

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[58] 250 B.R. at 381 n.5.

[59] Appellant's Reply Brief at 1.

[60] *Id.*

[61] Appellant's Opening Brief at 4-5 (citing 10 L. King, *Collier on Bankruptcy* § 8002.09[1], at 8002-16 (15th ed. Rev. 1999) p. 381).

period expire in the meantime."[62] While we have great respect for the *Collier* treatise, we have even more respect for the clear language contained in a Federal Rule of Bankruptcy Procedure. The notion that Rule 8002 provides for an "automatic" extension of time is inconsistent with the language of Rule 8002(c) itself, which provides that "[t]he bankruptcy judge ***may*** extend the time for filing the notice of appeal." Use of the word "may" indicates that the bankruptcy court has discretion, and to suggest that an extension of time is "almost automatic," is tantamount to suggesting it is mandatory, or non-discretionary.[63]

V. CONCLUSION

Pursuant to Federal Rule of Bankruptcy Procedure 8002, a motion for extension of time to appeal is committed to the sound discretion of the bankruptcy court. As did the Court in *Higgins*, "we acknowledge that denial of a motion for extension of time to appeal filed prior to expiration of the [fourteen]-day appeal period is unusual."[64] The standard of review on appeal is abuse of discretion. We are not permitted to substitute our judgment for that of the bankruptcy court. It is the bankruptcy court, not this Court, that is familiar with the parties and the proceedings before it. The bankruptcy court is in the best position to determine whether a losing party should be afforded more time in which to file an appeal. Our task is to determine whether the bankruptcy court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances,[65] or

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[62] 10-8002 *Collier on Bankruptcy* ¶ 8002.09[1], [3] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2010).

[63] In affirming the order on appeal, we are not ruling that a bankruptcy court cannot, in absence of good cause stated in the motion, grant the appellant an extension for time to appeal. Rule 8002 does not set forth any required standard for granting an extension when a motion is filed before the time to appeal has expired.

[64] 220 B.R. 1022, 1026 (10th Cir. BAP 1998).

[65] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994).

made "'an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.'"[66] Under the facts and circumstances of this case, we cannot conclude there was an abuse of discretion, and therefore we affirm the order of the bankruptcy court.

[66] *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (quoting *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991)).